No. 17-2

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE E-DISCOVERY INSTITUTE ET AL., IN SUPPORT OF NEITHER PARTY

DAVID KESSLER*
Counsel of Record
NORTON ROSE FULBRIGHT US LLP
1301 Avenue of the Americas
New York, NY 10019-6022
(212) 318-3382
david.kessler@
nortonrosefulbright.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. PRODUCTION OF DOCUMENTS LOCATED ON FOREIGN SOIL INTRUDES ON FOREIGN SOVEREIGNTY AND REQUIRES A COMITY ANALYSIS 6

A. Domestic Production Is Part Of A Process Of Discovery That May Cross Borders And Raise Sovereignty Concerns 6

B. The Mere Fact That Evidence Is Digital And Accessible From The U.S. Does Not Obviate The Need For A Comity Analysis 10

C. The Stored Communications Act Demonstrates Why Comity Analysis And Providing Due Respect To Foreign Laws Is Crucial To The Rule Of Law 13

II. COURTS NEED ADDITIONAL GUIDANCE TO PROPERLY WEIGH U.S. AND FOREIGN INTERESTS 17

TABLE OF CONTENTS — Continued

Page

III. THE COURT SHOULD PROVIDE GUIDANCE ON HOW TO DEMONSTRATE DUE RESPECT FOR FOREIGN INTERESTS AND, IN PARTICULAR, HOW TO WEIGH U.S. AND FOREIGN SOVEREIGNS' INTERESTS 21

A. The Court Should Articulate A Procedural Framework For Courts To Consider The *Aérospatiale* Factors 22

B. The Court Should Provide Additional Guidance On Weighing Foreign Interests 24

C. The Court Should Provide Better Guidance On Objective Consideration Of U.S. Interests 29

D. Where A Conflict Remains, Courts Should Minimize It As Much As Is Reasonably Possible 30

CONCLUSION 33

ADDENDUM

TABLE OF AUTHORITIES

Page(s)

CASES:

AstraZeneca LP v. *Breath Ltd.*, No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800 (D.N.J. Mar. 31, 2011) 18

BrightEdge Technologies, Inc. v. *Searchmetrics, GmbH.*, No. 14CV01009WHOMEJ, 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014) 12

Gucci Am., Inc. v. *Curveal Fashion*, No. 09 CIV. 8458 RJS/THK, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) 27

Hilton v. *Guyot*, 159 U.S. 113 (1895) 10

In re Activision Blizzard, Inc., 86 A.3d 531 (Del. Ch. 2014) 12-13

In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004) 20

In re Bard IVC Filters Prod. Liab. Litig., 317 F.R.D. 562 (D. Ariz. 2016) 33

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010) 18, 21

In re Perrier Bottled Water Litig., 138 F.R.D. 348 (D. Conn. 1991) 18

In re Search of Information Associated with [redacted]@gmail.com that is Stored at Premises Controlled by Google, Inc., Case No. 16-mj-00757 (BAH), 2017 WL 3445634 (D.D.C. July 31, 2017) 15

TABLE OF AUTHORITIES — Continued

Page(s)

In re Toft, 453 B.R. 186 (S.D.N.Y. 2011)..... 14-15

In re: Xarelto (Rivaroxaban) Prod. Liab. Litig., No. MDL 2592, 2016 WL 3923873 (E.D. La. July 21, 2016)..... 32

Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp., 829 F.3d 197 (2d Cir. 2016)..... 3, 11

Minpeco, S.A. v. *Conticommodity Servs., Inc.*, 116 F.R.D. 517 (S.D.N.Y. 1987) 27

Moore v. *Publicis Groupe*, 287 F.R.D. 182, 186 (S.D.N.Y. 2012), *adopted sub nom. Moore v. Publicis Groupe SA*, No. 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012)..... 32

Motorola Credit Corp. v. *Uzan*, 73 F. Supp. 3d 397 (S.D.N.Y. 2014)..... 17, 24

Munoz v. China Expert Tech., Inc., No. 07 CIV. 10531(AKH), 2011 WL 5346323 (S.D.N.Y. Nov. 7, 2011)..... 19, 25

Reinsurance Co. of Am. Inc. v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275 (7th Cir. 1990)..... 18, 25

S.E.C. v. *Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323 (2011)..... 13, 20-21

Société Nationale Industrielle Aérospatiale v. *U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987)..... *passim*

TABLE OF AUTHORITIES — Continued

Page(s)

St. Jude Med. S.C., Inc. v. *Janssen-Counotte*, 104 F. Supp. 3d 1150 (D. Or. 2015) 32

Suzlon Energy Ltd. v. *Microsoft Corp.*, 671 F.3d 726 (9th Cir. 2011) 13-14

Trueposition, Inc. v. *LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012) 27

RULES:

Fed. R. Civ. P. 34(A)(1) (as amended in 1987) 16

FOREIGN CASES:

Prop. All. Grp. Ltd. v. *The Royal Bank of Scotland PLC* [2015] EWHC 321 (Ch) 19

FOREIGN LAW:

Code du travail [Labor Code] art. 432-2-1 (Fr.) 26

Charter of Fundamental Rights of the European Union art. 7, 2012 O.J. C 326/02 26

Data Protection Act of 1988 (amended 2003) (amended to reflect EU Directive 95/96/EC) (Ir.) 25

Décret 81-550 du 12 mai 1981 portant application de l'article 2 de la loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des

TABLE OF AUTHORITIES — Continued

Page(s)

personnes physiques ou morales étrangères [Decree No. 81-550 dated May 12, 1981 implementing Art. 2 of Law No. 68-678 of 26 July 1968 Relating to the Communication of Documents and Information of an Economic, Commercial or Technical Nature to Foreign Natural or Legal Persons] (Fr.) 8

ePrivacy Regulations, S.I. 336 of 2011 (codifying EU Directive 2009/136/EC (as amended by Directive 2006/24/EC and 2009/136/EC)) (Ir.) 25

Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères [Law 80-538 of July 16, 1980 Relating to the Communication of Economic, Commercial or Technical Documents or Information to Foreign Persons or Legal Persons], Journal Officiel De La République Française [J.O.], July 17, 1980, art. 1A (Fr.). 8

Regulation (EU) 2016/679, General Data Privacy Regulation art. 46, 2016 O.J. (L 119) 1, 62 ..... 12, 26

OTHER AUTHORITIES:

American Bar Association, Resolution 103, adopted February 6, 2012..... 4

TABLE OF AUTHORITIES — Continued

Page(s)

Article 29 Data Protection Working Party ("WP"), WP 158, 11 February 2009 33

Bavarian SA, Activity report 2009/2010, p 70 *et seq* 32-33

Brian Friederich, *Reinforcing the Hague Convention on Taking Evidence Abroad After Blocking Statutes, Data Protection Directives, and* Aérospatiale, 12 San Diego Int'l L. J. 263 (2010) 28

Diego Zambrano, *Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational* Discovery, 34 Berkeley J. Int'l L. 157 (2016) 18-19

Ellen Relkin and Elizabeth O. Breslin, *Hiding Across the Atlantic*, 48 JUN Trial 14 (2012) 27

The Electronic Discovery Reference Model (v3.0) (2014) 6

Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181 (2015) 18-19

Google Transparency Report, *available at* https://transparencyreport.google.com/user-data/overview (last visited Dec. 11, 2017) 15

TABLE OF AUTHORITIES — Continued

Page(s)

Viviane Reding, Vice-President, Eur. Comm'n, Data Protection Reform: Restoring Trust And Building The Digital Single Market (Sept. 17, 2013) 29

Restatement (Third) of the Foreign Relations Law of the United States 29-30

The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality In The E-Discovery Process*, 15 Sedona Conf. J. 264 (2014) 6

The Sedona Conference, *Sedona International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition)* (January 2017) 23, 31-32

The Sedona Conference's Working Group 6 (WG6), *available at* https://thesedonaconference.org/wgs (last visited Dec. 11, 2017) 6

Trevor Jefferies and Alvin F. Lindsay, *New French Case Removes Automatic Privacy Shield from Employee E-mails, Making Them More Amenable to US. Discovery*, Hogan Lovells Chronicle of Data Protection (Feb. 18, 2010) 28

TREATY:

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 7

TABLE OF AUTHORITIES — Continued

Page(s)

Treaty Between the Government of the United States of America And the Government of Ireland On Mutual Legal Assistance in Criminal Matters, U.S.-Ir., Jan. 18, 2001, T.I.A.S. 13137. 9

IN THE

Supreme Court of the United States

No. 17-2

UNITED STATES,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE E-DISCOVERY INSTITUTE ET AL., IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICI CURIAE

Amici Curiae are a collection of e-discovery practitioners and professors that focus their practice on cross-border civil discovery and corporations that conduct cross-border discovery regularly.[1] *Amici* seek to assist this Court in addressing the conflict of laws that arises when, as here, a party is called on to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici curiae* or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

produce in the U.S. information that resides outside the U.S. and is subject to foreign data protection laws. In this circumstance, the producing party faces a conflict between meeting its U.S. legal obligations and complying with foreign laws that may regulate how a party manages, maintains, processes, transfers and discloses data.

Amici respectfully ask the Court to recognize this conflict in the present matter and provide guidance on how U.S. courts should address it. In particular, *Amici* write to highlight the importance of this Court's opinion in *Aérospatiale*, comity analysis, and due respect for foreign laws when U.S. discovery reaches into a foreign sovereign. As such, the brief of *Amici* will not address every point argued by the parties and *Amici* do not express an opinion on whether a warrant under the Stored Communication Act can compel a service provider to produce email out of a foreign jurisdiction. Instead, *Amici* focus on how to address the conflict between production of extra-U.S. data and foreign laws that limit or prohibit it.

Owing to the large number of *Amici*, the names and brief descriptions of these parties are attached as an addendum. To the extent individuals are listed as *Amici Curiae*, they are expressing their personal views and do not represent their companies, schools, firms, organizations, or clients.

SUMMARY OF THE ARGUMENT

This case involves a dispute about the appropriate application of the Stored Communications Act ("SCA"). While the parties agree that the SCA lacks extraterritorial reach, they dispute whether the warrant at issue in this case is extraterritorial. Microsoft argues that the warrant is extraterritorial

because it seeks information stored in Ireland; the government argues that the warrant is domestic because Microsoft could comply by "undertaking acts entirely within the U.S." Br. for the U.S. at 25. Put simply, Microsoft focuses on the location of the data, while the government focuses on the location of the human action taken to disclose it.

The Second Circuit recognized that the "international reach of American law" is a paramount consideration in the present matter. 829 F.3d 197, 225. It further claimed that its decision "also serve[d] the interests of ***comity*** that ... ordinarily govern the conduct of cross-boundary criminal investigations." 829 F.3d 197, 221 (emphasis supplied).

Despite this language, neither the Second Circuit nor the parties addressed the comity framework set forth in the landmark Supreme Court decision on cross-border discovery and comity: *Société Nationale Industrielle Aérospatiale* v. *U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). In *Aérospatiale*, this Court required trial courts to conduct a particularized comity analysis whenever civil discovery conflicts with foreign law to determine if the requesting party should be compelled to comply with an international treaty or foreign discovery process. 482 U.S. 543-44. Just as responding parties in the civil discovery progeny of *Aérospatiale* face the unenviable choice of violating United States discovery obligations or violating conflicting foreign laws, so too has this case — at least arguably — forced Microsoft to choose among similar options: (1) comply with the Government's interpretation of the SCA and violate Irish law; (2) comply with Irish law and be held in contempt in the United States; or (3) seek to quash the SCA warrant to the extent it requires Microsoft to

violate Irish law and thus force the United States to use a Mutual Legal Assistance Treaty ("MLAT").

However the Court decides this case, it should not lightly allow the U.S. government to intrude on Irish sovereignty or require Microsoft to break Irish law. *See* American Bar Association, Resolution 103, (adopted February 6, 2012) ("[I]n pursuit of its mission to uphold the rule of law, [the ABA] urges U.S. courts to respect the obligations of litigants to follow *all* laws applicable to their positions in the litigation and, where possible in the context of the proceedings before them, permit compliance with non-U.S. data protection and privacy laws."). If this Court finds that this warrant involves only domestic production, that production will rely on Microsoft's identification, collection, and retrieval — that is, Microsoft's discovery — of information stored abroad.

Amici therefore urge the Court to find that if the warrant is not impermissibly extraterritorial, it should be subject to a comity analysis that balances U.S. and Irish interests in this matter. To hold otherwise could mistakenly be read as a finding that discovery of information that is stored abroad but accessible within the United States does not require a comity analysis under *Aérospatiale*. *Amici* believe, on the contrary, that the analysis and factors set forth in *Aérospatiale* for conducting this balancing test are instructive and, with further clarification, provide a way forward when U.S. production processes cross borders.

Focusing on the conflict between a court order to produce data residing outside the U.S. and foreign laws that limit or prohibit it, *Amici* respectfully propose the following:

(1) This Court should acknowledge that the actions required to produce in the U.S. documents stored in a foreign country raise international sovereignty concerns, even where such documents are accessible from the U.S., because such actions could conflict with foreign law;

(2) Looking to *Aérospatiale*, the Court should require that where there is a conflict, courts demonstrate due respect for foreign sovereign interests by performing a comity analysis to determine if the requesting party should comply with an appropriate treaty;

(3) Because courts below have had difficulty applying certain *Aérospatiale* comity analysis factors, this Court should guide courts on how to properly balance U.S. and foreign interests; and

(4) Where a court determines that the requesting party need not use a treaty or foreign discovery process and the conflict remains, the Court should require courts and parties to adopt appropriate measures to reduce or mitigate foreign law violations.

This issue is not going away. The Court's approach here will reverberate beyond the specifics of this case. *Amici* urge the Court to consider the broader impact this case will have on discovery, including in the context of civil matters.

ARGUMENT

I. PRODUCTION OF DOCUMENTS LOCATED ON FOREIGN SOIL INTRUDES ON FOREIGN SOVEREIGNTY AND REQUIRES A COMITY ANALYSIS.

A. Domestic Production Is Part Of A Process Of Discovery That May Cross Borders And Raise Sovereignty Concerns.

Document production is not a single, isolated act. Instead, production is the last step in a process that includes identification, preservation, collection, processing, search, and review. *See* The Electronic Discovery Reference Model (v3.0) (2014)[2]; *The Sedona Conference*[3] *Commentary on Achieving Quality In The E-Discovery Process*, 15 Sedona Conf. J. 264, 286-98 (2014). Put simply, producing a document under legal

---

[2] Available at https://www.edrm.net/frameworks-and-standards/edrm-model/ (last visited Dec. 12, 2017).

[3] "The Sedona Principles and Sedona commentaries thereto are the leading authorities on electronic document retrieval and production." *Ford Motor Co.* v. *Edgewood Properties, Inc.*, 257 F.R.D. 418, 424 (D.N.J. 2009). "The Sedona Conference is a nonprofit legal policy research and educational organization which sponsors Working Groups on cutting-edge issues of law. The Working Group on Electronic Document Production is comprised of judges, attorneys, and technologists experienced in electronic discovery and document management matters." *Autotech Tchs. Ltd. P'ship* v. *Automationdirect.com, Inc.*, 248 F.R.D. 556, 560 n.3 (N.D. Ill. 2008). The Sedona Conference's Working Group 6 (WG6) "address[es] issues that arise in the context of e-information management and e-disclosure for organizations subject to litigation and regulatory oversight in multiple jurisdictions with potentially conflicting international laws." *Id.*, *available at* https://thesedonaconference.org/wgs (last visited Dec. 12, 2017). Many of the *Amici* are active in The Sedona Conference, particularly WG6.

compulsion — whether from a document request in a civil matter, a SCA warrant, or a third party subpoena — does not occur in a vacuum: whether a party needs only to find the executed contract in a customer's folder or must search terabytes of emails to find the handful that are responsive to a regulator's request, production is always preceded by other actions.

When documents[4] lie outside the U.S., at least some of those actions occur on foreign soil, and may thus be subject to foreign laws. Here, for example, there is no dispute that the relevant emails reside exclusively in Ireland. Ireland has explicitly asserted its interest "in potential infringements by other states of its sovereign rights with respect to its jurisdiction over its territory." Ireland CA2 Amicus Br. 1. Thus, Ireland's interests in protecting its sovereignty may well be violated when documents stored on its soil are retrieved for disclosure in America.

Where sovereign rights and foreign law conflict with U.S. production obligations, courts should conduct a comity analysis. In *Aérospatiale* the petitioners were two corporations owned by the Republic of France that sought a protective order to compel plaintiffs to conduct discovery through the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [the

---

[4] Documents and Electronically Stored Information ("ESI") exist somewhere in a physical location. The "cloud" is not some virtual world beyond geography. *See* Computer and Data Science Experts CA2 Amicus Br. at 11-16 (explaining that cloud documents are stored on physical servers that can be located abroad); Amazon.com Inc. and Accenture PLC CA2 Amicus Br. at 13 (same). Data may exist in one or multiple locations, but it must exist somewhere.

"Hague Convention"]. Petitioners argued that French Law — namely, the French Blocking Statute [5] — prohibited them from complying with U.S. discovery except through the Hague Convention. *Aérospatiale*, 482 U.S. at 525-26. The Magistrate Judge denied the protective order and allowed production through U.S. discovery. *Id.* at 526-27.

On appeal, this Court struck a middle way. The Court rejected categorical rules: the Hague Convention was not mandatory for cross-border discovery, [6] but a federal court also could not dismiss

[5] This statute prohibits all parties within French territory, and all French citizens or legal entities, from engaging in foreign discovery, except through formal channels such as those authorized by the Hague Convention. Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères [Law 80-538 of July 16, 1980 Relating to the Communication of Economic, Commercial or Technical Documents or Information to Foreign Persons or Legal Persons], Journal Officiel De La République Française [J.O.], July 17, 1980, art. 1A (Fr.). The Statute routes all discovery requests through French authorities. *See id.* at art. 2; Décret 81-550 du 12 mai 1981 portant application de l'article 2 de la loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères [Decree No. 81-550 dated May 12, 1981 implementing Art. 2 of Law No. 68-678 of 26 July 1968 Relating to the Communication of Documents and Information of an Economic, Commercial or Technical Nature to Foreign Natural or Legal Persons] (Fr.). Failure to comply can subject parties to criminal sanctions. *See id.* at art. 3.

[6] The *Aérospatiale* Court found that while the Hague Convention was Federal law, it did not impose a mandatory process for conducting civil discovery between signatory countries. *Aérospatiale*, 482 U.S. at 536. Likewise, to the extent that the Court finds that an SCA warrant can compel a party to produce email from outside the U.S., it should also determine if

it out of hand. *Id.* at 547. Instead, this Court held that each trial court must conduct a particularized comity analysis to determine if discovery could be ordered under the Federal Rules of Civil Procedure or should instead be routed through a treaty such as the Hague Convention. *Id.* at 543-44. In particular, the Court listed five factors to consider when performing this analysis:

> (1) the importance to the ... litigation of the documents or other information requested;
>
> (2) the degree of specificity of the request;
>
> (3) whether the information originated in the United States;
>
> (4) the availability of alternative means of securing the information; and
>
> (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Id. at 544 n.28 (quoting Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986) (Restatement)).

---

there are *mandatory* processes, such as a Mutual Legal Assistance Treaty between Ireland and the U.S, that apply. *See* Treaty Between the Government of the United States of America and the Government of Ireland on Mutual Legal Assistance in Criminal Matters, U.S.-Ir., Jan. 18, 2001, T.I.A.S. 13137. This issue was not addressed by the courts below and *Amici* do not address it here. It should also be noted that, unlike the instant matter, it was not disputed in *Aérospatiale* that a document request could compel a party to produce documents that were stored in another country.

Aérospatiale's holding recognizes that the extension of U.S. law beyond U.S. borders inherently "touches" the legal interests of other countries and invokes comity. *See Aérospatiale*, 482 U.S. at 543 n.27 ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."). This Court has long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. *See Hilton* v. *Guyot*, 159 U.S. 113 (1895). Simply limiting analysis to U.S. legal issues and interests, such as whether U.S. constitutional protections are satisfied, does not eliminate either the interests of the relevant foreign state or a U.S. court's duty to consider them. Rather, an attempt to apply U.S. law to conduct occurring abroad will often reveal a true conflict in interests, necessitating a comity analysis. *See Aérospatiale*, 482 U.S. at 555 ("[T]he threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law.").

B. The Mere Fact That Evidence Is Digital And Accessible From The U.S. Does Not Obviate The Need For A Comity Analysis.

Judge Jacobs, dissenting below, claimed that "[e]xtraterritoriality need not be fussed over when the information sought is already within the grasp of a domestic entity served with a warrant . . . [that] can reach what it seeks." 855 F.3d 53, 61 (Jacobs, J., dissenting). Judge Lynch similarly concluded:

> Corporate employees in the United States can review [email] records, when responding to the "warrant" or subpoena or court order just as they can do in the ordinary course of business, and

> provide the relevant materials to the demanding government agency, without ever leaving their desks in the United States. The entire process of compliance takes place domestically.

829 F.3d at 229; *see also* 855 F.3d 53, 61 (Jacobs, J., dissenting) ("no extraterritorial reach is needed to require delivery in the United States of the information sought, which is easily accessible in the United States at a computer terminal.").

But intrusion into another sovereign's domain, whether physical or digital, cannot be brushed aside so lightly. Judge Lynch's conclusion — that the entire process of compliance takes place domestically because that is where human actions occur — rests on the false assumption that human activity in one place does not affect physical objects in another. As explained above, production is only one step in a larger process. And as a practical matter, physical equipment must be manipulated where the ESI is housed. Borders are crossed when ESI abroad is accessed from the U.S. This becomes even clearer when considering that if a party could retrieve documents from a foreign country using a remote-controlled drone, the drone's intrusion would clearly raise territoriality concerns. Retrieving data from a computer in a foreign country is essentially no different.[7]

---

[7] Emails stored outside the U.S. are subject to the laws of the sovereign at their location. In the immediate case, amicus briefs filed with the Second Circuit explained that "the content of [the] email account [at issue] is located inside the EU and the customer therefore must benefit from the protections of EU law." Albrecht CA2 Amicus Br. at 8. Such benefits include that data will not be transferred from the EU unless the recipient state has in place safeguards ensuring the data receive equivalent

Aérospatiale's holding did not depend on where the people conducting discovery were standing, but on the intrusion into the foreign sovereign. Courts in civil cases have already conducted *Aérospatiale's* comity analysis where ESI is stored on foreign soil but is accessible in the U.S. For example, in *BrightEdge Technologies, Inc.* v. *Searchmetrics, GmbH.*, the plaintiff sought production of defendant's data stored on a server in Germany. No. 14CV01009WHOMEJ, 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014). The plaintiff argued that because it sought information from a customer relationship database that was being accessed and used in the U.S. by the defendant's employees, it was entitled to the documents. The court disagreed, noting that "[t]o the extent that the database is maintained in Germany, this factor weighs in favor of not ordering disclosure. . . ." *Brightedge* at *5.

Similarly, in *In re Activision Blizzard, Inc.*, the plaintiff sought production of the defendant's documents stored on servers in France and subject to French data protection laws. 86 A.3d 531 (Del. Ch. 2014). Although some electronic documents were likely available through the defendant's domestic subsidiary, and even originated in the U.S., the court noted that "more importantly . . . all of Vivendi's electronic documents are housed on its servers in Paris. There are no backups in the United States . . . ." *Id.* at 544. The *Activision* court rejected Plaintiff's argument that because documents stored in France were accessible through Vivendi's U.S. subsidiary, foreign law did not apply. Instead, it conducted a

---

protection. *Id.* (citing Parliament and Council Directive 95/46, 1995 O.J. (L 281) 31, 45 (EC)); *see also* Regulation (EU) 2016/679, General Data Privacy Regulation art. 46, 2016 O.J. (L 119) 1, 62.

comity analysis and ordered production in compliance with the French Data Protection Act. *Id.* at 550-52.[8] In the digital age — when foreign documents are available in the U.S. and U.S. documents are accessible abroad — *Aérospatiale*'s comity analysis should not be limited by where the actors are standing.

C. The Stored Communications Act Demonstrates Why Comity Analysis And Providing Due Respect To Foreign Laws Is Crucial To The Rule Of Law.

The SCA is a useful prism to show how courts should balance domestic and foreign interests, because it implicates both. While the SCA allows the U.S. government to seek production from domestic parties, for the rest of the world it acts primarily as a U.S. data protection law. Section 2710 of the SCA permits service providers to disclose the content of stored electronic communications in only three instances: (1) to the service provider, (2) to the individual account holder, and (3) to law enforcement as required under other provisions of the Wiretap Act and SCA. These provisions require service providers like Microsoft to block foreign discovery mechanisms.

For example, in *Suzlon Energy Ltd.* v. *Microsoft Corp.*, 671 F.3d 726 (9th Cir. 2011), the Ninth Circuit ruled that a domestic service provider need not comply with a request for emails arising from a civil

---

[8] *But see, S.E.C.* v. *Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323 (2011) ("The Receiver appears to imply that requiring SG Suisse to comply with his discovery request will not infringe upon Swiss sovereignty because case law treats such production as occurring within the United States. The Court agrees with the Receiver's reading of precedent.").

fraud proceeding in Australia against an Indian citizen with email in the U.S. The defendant had a Microsoft Hotmail account, and his emails happened to be stored on a Microsoft server in Washington. The Ninth Circuit affirmed that the SCA "at least applies whenever the requested documents are stored in the United States." *Id.* at 730. The court also pointed out that the defendant "reasonably relied upon his Hotmail service agreement, which stated that his emails would be disclosed only according to U.S. law . . . ." *Id.* at 731. Consequently, the Ninth Circuit allowed Microsoft to use the SCA to avoid production. Even though the plaintiff had argued that Australian law required production, the Ninth Circuit did not perform *Aérospatiale*'s balancing test, and indeed did not even consider it. *Id.*

Similarly, the court in *In re Toft*, 453 B.R. 186 (S.D.N.Y. 2011), reached a decision despite a legitimate German discovery order. Toft, a German citizen, was a debtor with no connection to the U.S. except that his email accounts were there. The German court entered a "Mail Intercept Order" allowing a German administrator to intercept Toft's postal and electronic mail, and the administrator sought an enforcement order from a U.S. bankruptcy court. *Id.* at 188. That court refused, finding the German Order was "manifestly contrary" to U.S. public policy because it contravened the SCA:

> The relief ... is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional

> safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief would impinge severely a U.S. constitutional or statutory right.

Id. at 201, 198 (citations and quotations omitted).

In contrast, in a recent request under Section 2703 of the SCA, the District Court for the District of Columbia held the U.S. government was entitled to emails located abroad. In *In re Search of Information Associated with [redacted]@gmail.com that is Stored at Premises Controlled by Google, Inc.*, Case No. 16-mj-00757 (BAH), 2017 WL 3445634 (D.D.C. July 31, 2017), the court pointed out that companies operating in more than one country might be subject to the jurisdiction of two sovereigns. Tellingly, while the court cited *Aérospatiale* to declare that the U.S. court was not deprived of the ability to compel disclosure, it ignored *Aérospatiale's* comity analysis and did not meaningfully weigh the interests of the other jurisdiction even after recognizing them. *Id.* at *14.

These cases[9] represent an inherent contradiction in how courts interpret the SCA — and U.S. discovery generally — when it crosses U.S. borders. Domestic parties seeking foreign data often manage to evade not only foreign statutes but also compliance with international treaties. Foreign parties seeking U.S.

---

[9] Indeed, this issue is more substantial than it may appear: Google reported that, between January 1, 2017 and June 30, 2017, it received 48,941 requests for data from 83,345 accounts from various governments, and that it complied with 65% of them. Google Transparency Report *available at* https://transparencyreport.google.com/user-data/overview (last visited Dec. 12, 2017). Google received roughly the same number of requests — taken together — from the governments of France, Germany, and the U.K. as it did from the United States.

data, however, are often subject to U.S. data protection laws and must follow those very treaty processes that domestic parties can avoid. This unequal treatment illustrates why U.S. courts must afford "due respect" to foreign laws so that other countries will reciprocate and continue to provide "due respect" to ours.

Comity analysis can help. Here, as in *Aérospatiale*, the SCA warrant involves international interests. The United States contends that the SCA warrant is purely domestic because it only requires production in the U.S. (Pet. 14 (analyzing Section 2703; Br. for the U.S. at 25)). This contravenes *Aérospatiale*'s holding mandating a comity analysis. *Id.* at 544. Just like the relevant sections of the SCA, Federal Rule of Civil Procedure 34 in 1987 spoke only to production. Fed. R. Civ. P. 34(A)(1) (allowing parties to serve requests "to ***produce*** . . . designated documents" that were in the opposing party's control) (as amended in 1987) (emphasis supplied). The rule does not mention preservation, collection, or review, but production requires all of those steps. The *Aérospatiale* Court clearly understood that the mere fact that ***production*** would occur domestically did not mean that ***discovery*** would too. To effectuate production the French companies would need to find and collect documents in France and transfer them to the U.S., implicating French interests and French laws.

Here, even if no person in Ireland needs to act, some of the conduct nonetheless occurs in a foreign state: emails will be identified, copied, and transmitted to this country. Thus, even if production is a purely domestic act, the prior steps invoke comity considerations of the kind recognized in *Aérospatiale*.

II. COURTS NEED ADDITIONAL GUIDANCE TO PROPERLY WEIGH U.S. AND FOREIGN INTERESTS.

Unfortunately, comity's value in principle outweighs its value in practice. The *Aérospatiale* Court warned trial courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position" and explained that "[w]hen it is necessary to seek evidence abroad . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses." *Id.* at 546. By its own admission, however, the *Aérospatiale* Court provided scant guidance to lower courts on how to conduct a comity analysis. *Id.* ("We do not articulate specific rules to guide this delicate task of adjudication.").

Trial courts have recognized the fifth factor — the balancing of U.S. and foreign interests — as the most important. *See, e.g.*, *Motorola Credit Corp.* v. *Uzan*, 73 F. Supp. 3d 397, 401-02 (S.D.N.Y. 2014) ("[I]t must not be forgotten that what we are concerned with here is a comity analysis, and from that standpoint the most important factor is the fifth factor . . . ."). Sadly, the dissent in *Aérospatiale* rightly predicted that courts would be "ill equipped to assume the role of balancing the interests of foreign nations with that of our own" because "relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood." *Aérospatiale*, 482 U.S. at 552 (Blackmun, J., dissenting). Courts often either demonstrate a "pro-forum bias" favoring familiar local laws and procedures over unfamiliar foreign or treaty procedures, or they allow judicial inexperience in

foreign relations to reach the same result. *See id.*; *see also* Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181 (2015) (finding that "[c]ourts applying the *Aérospatiale* test have found each of the subjective factors to weigh in favor of U.S. discovery (that is, in favor of violating foreign law) by a ratio of at least four to one.").

Indeed, courts overwhelmingly find that U.S. interests in discovery are more important than whatever foreign interests are at issue. *See generally* Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181, 182 (2015). In the thirty years since *Aérospatiale*, only a small minority of cases have either required a requesting party to use the Hague Convention or excused a responding party from producing documents under Rules 26 and 34 because those documents were located abroad. *See* Diego Zambrano, *Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational* Discovery, 34 Berkeley J. Int'l L. 157, 178 (2016) (citing cases); *see, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348 (D. Conn. 1991); *Reinsurance Co. of Am. Inc.* v. *Administratia Asigurarilor de Stat*, 902 F.2d 1275 (7th Cir. 1990). Trial courts routinely find that the U.S. courts' search for truth or the U.S. government's public interest in enforcing its regulations trumps whatever foreign interest is present. *See, e.g., AstraZeneca LP* v. *Breath Ltd.*, No. CIV. 08-1512 (RMB/AM), 2011 WL 1421800 (D.N.J. Mar. 31, 2011) (Swedish Trade Secret Protection Act).

Worse, trial courts find this weighing of interests to be dispositive in most cases. *See, e.g.*, *Munoz* v. *China Expert Tech., Inc.*, No. 07 CIV. 10531(AKH), 2011 WL 5346323, at *2 (S.D.N.Y. Nov. 7, 2011) ("[The fifth] factor alone is enough to tip the balance in favor of a presumption of disclosure in this case").

As U.S. interests in the search for truth and in law enforcement exist in all cases, finding that these trump all foreign interests in regulating data on their soil effectively nullifies comity analysis — the domestic interest is pre-ordained to win. *See* Diego Zambrano, *Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 Berkeley J. Int'l L. 157, 202 (2016) (reviewing court acknowledged U.S. interests and finding that "courts ha[ve] developed wildly uninhibited categories, where U.S. interests [are] seen as paramount without much explanation"). When U.S. interests trump foreign interests almost by default, this Court's balancing test becomes a mere box to check.

Treating comity as a formality does not show adequate respect for foreign interests and inevitably has created a backlash from other countries. *See, e.g.*, Geoffrey Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181, 193 (2015) ("As court-ordered law breaking has become common, foreign governments have begun to express outrage."); *see also Prop. All. Grp. Ltd.* v. *The Royal Bank of Scotland PLC* [2015] EWHC 321 (Ch) (U.K. court compels the production of a document that a U.S. court had ordered sealed).

Without more guidance, it is too easy for trial courts to take a provincial view and put a finger on the scale

in favor of the requesting party and U.S. interests. That is exactly what the *Aérospatiale* dissent predicted. 482 U.S. at 553 n.4 ("There is also a tendency on the part of courts, perhaps unrecognized, to view a dispute from a local perspective.") (quoting *Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 951 (1984)). This allows trial courts to disregard the particularized analysis mandated in *Aérospatiale* and order discovery under the Federal Rules as a matter of course. *See S.E.C.* v. *Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 327-28 (N.D. Tex. 2011) (criticizing courts for taking the wrong lessons from *Aérospatiale*, "[allowing] litigants to obtain discovery under the Federal Rules as of right" and failing to exercise the "special vigilance" *Aérospatiale* requires).

Indeed, courts ***want*** additional guidance to supplement *Aérospatiale*. Judge Roth of the Third Circuit has expressed concern that courts use *Aérospatiale* as an excuse to avoid conducting an analysis of foreign national interests. "Many times, rather than wade through the mire of a complex set of foreign statutes and case law, judges marginalize the [Hague] Convention as an unnecessary 'option.'" *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 306 (3d Cir. 2004) (Roth, J., concurring) (quoting *Aérospatiale*) (internal citations removed). Judge Roth advocates reexamining *Aérospatiale* "to ensure that lower courts are in fact exercising 'special vigilance to protect foreign litigants' and demonstrating respect 'for any sovereign interest expressed by the foreign state'" rather than "simply discarding [the Hague Convention] as an unnecessary hassle." *Id.*; *see also, e.g., S.E.C.* v. *Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 337 (N.D. Tex. 2011)

("[A]lthough courts may accurately identify the sovereign interests at play in a particular case, they generally are not the proper bodies to weigh which sovereign's interests are more meritorious.").

III. THIS COURT SHOULD PROVIDE GUIDANCE ON HOW TO DEMONSTRATE DUE RESPECT FOR FOREIGN INTERESTS AND, IN PARTICULAR, HOW TO WEIGH U.S. AND FOREIGN SOVEREIGNS' INTERESTS.

Judge Roth's plea is anomalous, not because she requests more guidance, but because she sits on an appellate court. Because they are interlocutory, cross-border discovery decisions rarely receive appellate review. [10] *See Aérospatiale*, 482 U.S. at 554 ("Exacerbating these shortcomings is the limited appellate review of interlocutory discovery decisions, which prevents any effective case-by-case correction of erroneous discovery decisions.") (footnote omitted) (Blackmun, J., dissenting); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, at *7 (E.D.N.Y. Aug. 27, 2010) (noting that the "relative dearth of appellate decisions makes it more difficult to identify a coherent body of doctrine"). This hampers development of a robust jurisprudence.[11]

---

[10] In fact, only 52 Circuit Court cases cite *Aérospatiale* compared to 400 published District Court cases (as of December 12, 2017 on WestLaw).

[11] The Sedona Conference has stepped into the void to create a dialogue among the bench, the bar, litigants and foreign data protection practitioners and authorities to move the law forward in a just and reasoned way. *See* Sedona International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition) (January 2017) (published after engaging

Clarifying this area of law will also help incentivize nations to create effective, practical mechanisms that simultaneously allow for reasonable international discovery and reasonable protection of local interests. Ideally, if the United States knows discovery will be conducted using treaties, it will want to negotiate practical ones and limit perceived discovery abuses and fishing expeditions. Likewise, foreign nations will know that if they negotiate effective treaties they will be followed, but that cumbersome procedures will fail under a comity analysis and will consequently be ignored in the U.S.

In the best of cases, treaties take many years to negotiate. Thus, the Court should take this opportunity now to build upon *Aérospatiale* and provide guidance to trial courts on how to conduct the analysis and, in particular, how to weigh domestic and foreign interests more objectively.

A. The Court Should Articulate A Procedural Framework For Courts To Consider The *Aérospatiale* Factors.

First, while courts need guidance on how to weigh foreign and U.S. interests, they also need assistance in identifying how and when to conduct the comity analysis. This will help create a set of level and neutral scales to balance competing interests.

In accordance with *Aérospatiale*, whenever there is a conflict between foreign law and U.S. discovery procedure, the trial court should conduct a comity analysis to determine if the requesting party should be required to use a foreign discovery mechanism.

---

with "members of the judiciary, data protection authorities, and government officials from beyond the U.S. and EU, including from Asia, Canada, Australasia, and Africa.").

It should be incumbent on the producing party to establish the existence and scope of the conflict, including any mechanisms, like the Hague Convention, that could be used to avoid it. In the interests of comity and the rule of law, however, it should be incumbent on the requesting party — who is advocating violating foreign law — to establish that the discovery is necessary and that the U.S. interest in the discovery is more important than the foreign interest at issue. *See* Sedona International Litigation Principles, Principle 3 ("Preservation, disclosure, and discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.").

Of course, courts should not waste time on a full comity analysis if it will be pointless. As the *Aérospatiale* dissent recognized, there is no point in conducting the analysis if it is either (1) futile; or (2) the treaty has been tried and proven to be unhelpful and/or unproductive. *Aérospatiale*, 482 U.S. at 549. In the rare case where the responding party cannot provide an effective and compliant mechanism — such as the Hague Convention or MLAT — the question becomes not whether the requesting party must use a treaty, but whether they are entitled to the documents. If the requesting party is entitled to the documents and there is no effective, compliant legal method to obtain them — such as where there is no treaty and a blocking statute — then the analysis is futile. Moreover, if the requesting party attempts to obtain documents legally through a treaty or other mechanism and it is either unreasonably denied or progress is unreasonably slow, conducting a comity analysis that forces the requesting party back into an

unproductive process is a waste of judicial and litigant resources.

Finally, if a party has acted in bad faith and moved documents or ESI out of the U.S. only to avoid production, the responding party's bad faith should deprive it of the benefit of the comity analysis. *Cf. In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *6 (D.D.C. June 20, 2001) (ordering production without geographic limitation where "foreign defendants may have transferred key documents to their unnamed foreign affiliates to prevent plaintiffs from discovering this information.").

B. The Court Should Provide Additional Guidance On Weighing Foreign Interests.

Second, courts need help evaluating foreign interests so they can objectively compare them with U.S. interests. One question that this Court could answer for lower courts is whether they should differentiate between blocking statutes and substantive laws. One of the unfortunate consequences of *Aérospatiale* is that because the Court was so dismissive of the French Blocking Statute, French Penal Code Law No. 80–538 — a statute that the Court found "was originally inspired to impede enforcement of United States antitrust laws," *Aérospatiale*, 522 U.S. at 527 — lower courts have been equally dismissive of *all* foreign interests including substantive laws. *See, e.g., Motorola Credit Corp.* v. *Uzan*, 73 F. Supp. 3d 397, 402 (S.D.N.Y. 2014) (stating that French, Swiss, Jordanian, and UAE laws "suggest . . . a strong competing interest. But is this for real?"). While some courts have distinguished between different foreign interests embodied in a variety of local laws, many have not. *Compare*

Reinsurance Co. of Am. v. *Administratia Asigurarilor de Stat (Admin. Of State Ins.)*, 902 F.2d 1275, 1280 (7th Cir. 1990) (finding that Romanian law was "directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests") *with Munoz* v. *China Expert Tech., Inc.*, No. 07 CIV. 10531 (AKH), 2011 WL 5346323, at *2 (S.D.N.Y. Nov. 7, 2011) (China's interest in production under state secrecy law "speculative.").

Foreign laws that create substantive rights and obligations with respect to documents and information demonstrate a real foreign interest that, in the words of *Aérospatiale*, deserves due respect. In contrast to laws designed merely to thwart U.S. discovery, substantive laws protect interests of the sovereign and its people. Respectfully, *Amici* urge the Court to indicate to courts the importance of respecting substantive foreign laws. Courts should carefully consider whether to require responding parties to violate substantive foreign laws in the course of ordinary U.S. discovery. This is especially important where foreign laws provide rights to third-parties not directly involved in the action.

Indeed, this case raises this very distinction. As Microsoft and several *amici* argued in the Second Circuit, Ireland and other EU member states have enacted data protection laws including the EU General Data Protection Regulation (GDPR). Data Protection Act of 1988 (amended 2003) (amended to reflect EU Directive 95/96/EC); ePrivacy Regulations, S.I. 336 of 2011 (codifying EU Directive 2009/136/EC (as amended by Directive 2006/24/EC and 2009/136/EC)). Data protection is considered a fundamental human right in the EU and is

incorporated in the Charter of Fundamental Rights of the European Union. *See* Regulation (EU) 2016/679, General Data Privacy Regulation recital 1, 2016 O.J. (L 119) 1; Charter of Fundamental Rights of the European Union art. 7, 2012 O.J. C 326/02. These laws provide substantive rights to EU citizens and residents, give them control of their personal data, and impose obligations on data controllers and processers to process or transfer personal data only in a lawful and fair manner. *See* Verizon CA2 Amicus Br. at 11-12, *Microsoft Corp.* v. *United States*, No. 14-2985-cv (2nd Cir. Dec. 15, 2014.) (stressing that many countries value privacy as a fundamental right, and that U.S. overreach "would create a dramatic conflict with foreign data protection and privacy laws . . . [that] would expose U.S. companies and their personnel to potential civil and criminal liability."). These laws would exist regardless of any discovery demands and demonstrate an interest by EU Member States in protecting the Personal Data of citizens and residents.

Additionally, many countries have other laws that regulate how companies and organizations manage information, including labor and employment laws, general privacy regulations, telecommunication and other industry laws and professional secrecy laws. *See, e.g.*, Code du travail [Labor Code] art. 432-2-1 (Fr.) (requiring employers to consult with an EU works council before implementing employee monitoring technologies). Similar to classic data protection laws, these statutes can limit or prohibit certain discovery processes.

Importantly, review of the case law and literature shows an insidious argument that threatens the foundation of comity: that all foreign laws should be

ignored because they are simply a tool for avoiding discovery. *See, e.g., Gucci Am., Inc.* v. *Curveal Fashion*, No. 09 CIV. 8458 RJS/THK, 2010 WL 808639, at *2 (S.D.N.Y. Mar. 8, 2010); *see also, e.g.*, Ellen Relkin and Elizabeth O. Breslin, *Hiding Across the Atlantic*, 48 JUN Trial 14, 14 (2012) (arguing that companies "increasingly . . . block discovery by hiding behind European privacy laws" and warning that "[t]he plaintiff bar should be aware of this pernicious tactic and be armed with a strategy for a strong response."). Beyond showing a lack of understanding and being openly disrespectful to the foreign sovereigns, this argument ignores the practical reality that companies are equally prohibited from producing protected data documents that would help their case.

This Court should also address whether the enforcement history of a foreign statute should affect comity analysis. Some courts have considered whether a producing party would suffer undue "hardship" if it had to produce the requested documents. *See, e.g., Minpeco, S.A.* v. *Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522-523 (S.D.N.Y. 1987). While not in the original factors, several courts have looked at this issue by assessing the risk of actual enforcement of the foreign law at issue. *See, e.g., Trueposition, Inc.* v. *LM Ericsson Tel. Co.*, No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012). Commentators have criticized this approach. *See, e.g.*, Brian Friederich, *Reinforcing the Hague Convention on Taking Evidence Abroad After Blocking Statutes, Data Protection Directives, and* Aérospatiale, 12 San Diego Int'l L. J. 263, 292-94, (2010) (suggesting that regardless of how a court determines the enforcement factor, the result will be unfair to litigants).

While the level of enforcement facially may appear to distinguish real foreign sovereign interests from pretextual ones, this consideration gives courts an excuse to ignore the interests of other countries. After all, U.S. courts do not consider whether domestic laws are actually enforced; they presume, correctly, that if Congress enacted them, then they deserve respect. Moreover, focusing on "enforcement" skews the analysis in a number of ways. For example, by focusing on actual enforcement courts ignore prosecutorial discretion and non-public enforcement means common outside the U.S. It is even harder to assess recently-enacted statutes and emerging regulatory frameworks by this standard, especially from the developing world. Moreover, it creates a perverse incentive to escalate enforcement and penalties so that U.S. courts will take foreign laws seriously. For example, the failure of companies, especially U.S. companies, to take data protection seriously in the EU, including in the process of responding to U.S. government demands, was one motivation behind the GDPR.[12]

C. The Court Should Provide Better Guidance On Objective Consideration Of U.S. Interests.

In addition to guidance to prevent courts from undervaluing foreign interests, this Court should also provide guidance on properly weighing domestic

---

[12] Viviane Reding, Vice-President, Eur. Comm'n, Data Protection Reform: Restoring Trust And Building The Digital Single Market (Sept. 17, 2013) (advocating for the GDPR as a centralized data protection law to prevent the transfer of data to the U.S. and incentivize compliance with EU law when companies face a conflict of laws), *available at* http://europa.eu/rapid/press-release_SPEECH-13-720_en.htm.

interests. The Court could assist courts in understanding and eliminating undue bias in favor of U.S. discovery procedures. This Court could help rebalance the scales by emphasizing that U.S. discovery is much broader than permitted elsewhere,[13] *Aérospatiale*, 482 U.S. at 542, and that the search for truth cannot always be more important than foreign sovereigns' interests.

Indeed, U.S. interests are more complex than most courts often imply. The U.S. has an interest in upholding the rule of law, in mitigating and eliminating international conflict, and in maintaining amicable relations with international neighbors. As the Restatement (Third) on Foreign Relations states:

> In making the necessary determination of the interests of the United States . . ., the court or agency should take into account not merely the interest of the prosecuting or investigating agency in the particular case, but the long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations.

---

[13] "The differences between discovery practices in the United States and those in other countries are significant, and '[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.'" *Aérospatiale*, 482 U.S. at 549 (Blackmun, J., dissenting) (quoting Restatement of Foreign Relations Law of the United States (Revised) § 437, Reporters' Note 1, p. 35 (Tent. Draft No. 7, Apr. 10, 1986)).

Sec. 442, cmt. c. These considerations are rarely factored into comity analysis, and according them their proper weight would appropriately balance comity analysis.

Finally, not all matters and discovery have equal value. For example, the interests of a government entity seeking to protect the public good likely deserve more weight than a private complainant's interests. Thus, when seeking information outside the U.S. without using mechanisms acceptable under foreign law, the requesting party, especially a private party, should show how the information sought is necessary to protect the *public* interests of the U.S. and its citizens, not just the litigant's private interests.

D. Where A Conflict Remains, Courts Should Minimize It As Much As Is Reasonably Possible.

Finally, the Court should emphasize that even where it is not appropriate to require parties or law enforcement agencies to resort to treaty-based provisions, courts should take every reasonable step to minimize or eliminate the conflict even where it takes longer, imposes reasonable burdens, and does not unreasonably limit the scope of allowed discovery. As this Court held in *Aérospatiale*:

> Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. . . . Objections to "abusive" discovery that foreign litigants

> advance should therefore receive the most careful consideration.

482 U.S. at 546.

Where possible, courts should use the tools at their disposal to eliminate or mitigate cross-border conflicts. The Sedona Conference's International Litigation Principles provide some tools to do this:

> (1) Limiting the scope of requests and requiring more specificity in requests that seek documents;[14]
>
> (2) Phasing discovery to prioritize production from U.S. sources which may limit the need to reach across borders;
>
> (3) Using redaction, anonymization, and psuedonymization to limit disclosure of protected data;
>
> (4) Producing documents in appropriate formats to minimize the unnecessary production of irrelevant protected data and provide data security; and
>
> (5) Using protective orders and sealing orders to limit the disclosure and use of protected data.

Id. at 20-23 (Principles 4 and 5) ("Where a conflict exists between Data Protection Laws and preservation, disclosure, or discovery obligations, a

---

[14] Not all requests serve the same interest or are equally important. Where there is a conflict with foreign laws, courts should ask whether the information is *necessary* to resolving the dispute, or merely relevant. *See Aérospatiale*, 283 U.S. at 546. Requesting parties should be asked to narrow their requests to what they actually need and it should be understood that discovery will not be as broad outside as it is within the U.S. *See* Sedona International Litigation Principles, Principle 3.

stipulation or court order should be employed to protect Protected Data and minimize the conflict.").

Some courts have been adopting these measures, but guidance from the Court would help. *See, e.g.*, *Moore* v. *Publicis Groupe*, 287 F.R.D. 182, 186 (S.D.N.Y. 2012), *adopted sub nom. Moore* v. *Publicis Groupe SA*, No. 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (citing Sedona International Litigation Principles and excluding French employee whose emails were "stored in France and likely would be covered by the French privacy and blocking laws" from first production phase); *see also In re: Xarelto (Rivaroxaban) Prod. Liab. Litig.*, No. MDL 2592, 2016 WL 3923873 at *19-20 (E.D. La. July 21, 2016) (redacting production in compliance with Germany's data protection law); *St. Jude Med. S.C., Inc.* v. *Janssen-Counotte*, 104 F. Supp. 3d 1150, 1164 (D. Or. 2015) (documents containing protected data to be designated for attorneys' eyes only and filed under seal).

These tools are the last line of defense where the Court has recognized the conflict and, after conducting a comity analysis, required production without resort to a treaty. To enable a party to substantially comply with both its U.S. and foreign obligations, courts may need to consider more creative and broader solutions than in purely domestic matters.[15] For example, courts may allow a company to redact Personal Data (including individuals' names and email addresses), then require the requesting party to identify a smaller cut of necessary materials to be unredacted. *See* Article 29 Data Protection

---

[15] However, there is more latitude for such measures in civil than in criminal and law enforcement matters.

Working Party ("WP"), WP 158, 11 February 2009 at 11;[16] Bavarian SA, Activity report 2009/2010 at 70 *et seq.*[17] Such accommodations would go a long way to demonstrating due respect for foreign sovereigns and law by facilitating compliance while ensuring that U.S. discovery obligations are met.

At the same time, courts need to consider the additional cost and burden of conducting cross-border discovery. U.S. rules require that the documents sought be incrementally more valuable in order for the discovery to be proportionate and not outside the scope of discovery. *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016). Otherwise, courts will fail to undertake the "special vigilance to protect foreign litigants from . . . unnecessary, or unduly burdensome, discovery. . . ." mandated by *Aérospatiale*. 482 at 546.

CONCLUSION

As the parties and the *amici* below readily agree, the best solution for resolving this conflict is through Congress and international treaties. Until that happens, the Court has proven safeguards and principles to help manage and mitigate conflicts when U.S. discovery intrudes on another sovereign's domain. However the Court rules on the merits of this action, *Amici* respectfully request that it re-emphasize the importance of an objective and neutral comity analysis when conducting cross-border discovery and provide guidance on how courts should conduct that

---

[16] Available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2009/wp158_en.pdf (last visited Dec. 12, 2017).

[17] Available at https://www.lda.bayern.de/media/baylda_report_04.pdf (last visited Dec. 12, 2017).

analysis to afford due respect for foreign sovereign interests.

Respectfully submitted,

DAVID KESSLER*
Counsel of Record

NORTON ROSE FULBRIGHT US LLP
1301 Avenue of the Americas
New York, NY 10019-6022
(212) 318-3382
david.kessler@
nortonrosefulbright.com

Counsel for Amici Curiae

ADDENDUM

AMICI CURIAE

Institutional Amici

The **E-Discovery Institute ("EDI")** is a registered 501(c)(3) non-profit organization dedicated to bipartisan education, leadership, service, advocacy and research at the intersection of law and technology. The EDI community comprises corporate counsel, private practitioners, judges, professors of law and science, consultants, technologists and experts, and its activities focus on discovery, information governance, cybersecurity, litigation and big data management. For the last three years, EDI has collaborated with the Federal Judicial Center to provide training for federal judges and magistrate judges.

Deere & Company is one of the oldest industrial companies in the United States. Deere manufactures agricultural, construction, forestry, engine and lawn care products. Since its founding in 1837, Deere has delivered products and services to support those linked to the land.

Freddie Mac is a publicly traded government-sponsored enterprise (GSE) created to expand the secondary market for mortgages in the U.S. by buying mortgages on the secondary market, pooling them, and selling them as mortgage-backed security to investors world-wide on the open market.

Bayer U.S. LLC is an enterprise with core competencies in the Life Science fields of health care and agriculture. Its products and services are designed to benefit people and improve their quality of life.

Gilead Sciences, Inc. is a research-based biopharmaceutical company that discovers, develops and commercializes innovative medicines in areas of unmet medical need. It strives to transform and simplify care for people with life-threatening illnesses around the world. Gilead's portfolio of products and pipeline of investigational drugs includes treatments for HIV/AIDS, liver diseases, cancer, inflammatory and respiratory diseases, and cardiovascular conditions.

GlaxoSmithKline LLC is a science-led global healthcare company. GSK has three world-leading businesses that research, develop and manufacture innovative pharmaceutical medicines, vaccines and consumer healthcare products. It is committed to widening access to our products, so more people can benefit, no matter where they live in the world or what they can afford to pay. GSK is on a mission to help people do more, feel better, live longer."

Pfizer Inc.

Individual Amici

Denise E. Backhouse is a Shareholder and eDiscovery Counsel at Littler Mendelson, P.C. Denise

serves on the Steering Committee of The Sedona Conference® Working Group 6 on International Discovery and is Editor-in-Chief of Sedona's International Principles on Discovery, Disclosure and Data Protection in Civil Litigation (Transitional Edition), and International Principles for Addressing Data Protection in Cross-Border Government & Internal Investigations.

Steven C. Bennett is a partner at Park Jensen Bennett LLP. He teaches a course in the E-Discovery process at Hofstra Law School. He is a member of the NYSBA Commercial Federal Litigation Sub-Committee on E-Discovery, and a founding member of The Sedona Conference® Working Group 6 on International Discovery.

Susan I. Bennett is Principal of Sibenco Legal & Advisory based in Sydney, Australia. Susan is an Australian lawyer. She is the Co-founder and Director of Information Governance ANZ and active member of The Sedona Conference® Working Group 6 on International Electronic Information Management, Discovery and Disclosure.

Tess Blair is a partner at Morgan, Lewis & Bockius LLP and founder and leader of the firm's eData practice group. Tess's practice has focused on eDiscovery and information governance for over 15 years and she and her team regularly represent global organizations in matters involving cross-border discovery. Tess has taught eDiscovery at Villanova School of Law and has served as Special eDiscovery Master in the Federal courts.

Daniel M. Braude is a partner at Wilson Elser Moskowitz Edelman & Dicker LLP and co-chair of the firm's E-Discovery Practice Team. Dan serves as an adjunct professor at the Elisabeth Haub School of Law at Pace University where he teaches a course on e-Discovery. He is a member of The Sedona Conference® Working Group 6 on International Discovery.

Michelle Briggs is e-discovery counsel at Goodwin Procter. Michelle is an active member of The Sedona Conference® Working Group 1 on Electronic Document Retention and Production, and The Sedona Conference® Working Group 11 on Data Protection and Security.

Patrick J. Burke is Counsel to Bennett & Samios LLP in New York City where he counsels clients on cross-border e-discovery, data privacy and security. He has taught law school courses on eDiscovery and information governance and is the Co-founder of the Cardozo Data Law Initiative at the Benjamin N. Cardozo School of Law.

Craig D. Cannon is Global Discovery Counsel at Kilpatrick, Townsend & Stockton LLP and the leader of the firm's E-Discovery and Information Governance Team. Craig was formerly Global Discovery Counsel for a major global financial institution and is an active member of The Sedona Conference® Working Group 6 on International Discovery.

David R. Cohen is a Partner at Reed Smith LLP, where he is Practice Group Leader of the Records & E-Discovery Practice Group. He is active in The Sedona Conference® Working Group 6 on International Discovery, Chairs the International Ambassadors Section of the Duke Law School/EDRM Cross-Border Discovery Committee, and has been appointed as an E-Discovery Special Master in multiple federal cases.

Therese Craparo is a partner at Reed Smith LLP in the Firm's IP, Tech and Data and Records & eDiscovery groups. Therese has been an eDiscovery practitioner for more than 15 years, advising multi-national organizations on data privacy and cross-border data transfers. She is a frequent presenter at continuing legal education seminars regarding eDiscovery, including cross-border discovery.

Chris Dale is an English lawyer who has for many years provided education and commentary on all aspects of electronic discovery, both domestically and in an international (particularly U.S.) context, including a particular focus on privacy and data protection, and on cross-border litigation. He is a member of The Sedona Conference® Working Group 6 on International Discovery.

Andrea L. D'Ambra is a partner at Norton Rose Fulbright US LLP and member of the firm's E-Discovery and Information Governance Group. Andrea teaches Electronic Discovery at Temple Law School and William and Mary School of Law. She is

an active member of The Sedona Conference® Working Group 6 on International Discovery.

Anthony J. Diana is a partner at Reed Smith LLP in the Firm's IP, Tech and Data and Records & eDiscovery groups. Anthony serves as eDiscovery and global data privacy counsel for large, multinational organizations addressing cross-border data transfers and eDiscovery. He is key member of Working Group 1 of The Sedona Conference®, selected for participation in sub-committees tasked with providing comments to the Rules Committee on the proposed amendments to the Federal Rules of Civil Procedure and with revising the Sedona Principles

Maureen A. Duffy is a Senior Consultant of Sibenco Legal & Advisory based in Melbourne, Australia and is a licensed lawyer both in the U.S. and Australia, and a member of the member of The Sedona Conference® Working Group 6 on International Discovery.

Amor Esteban is a trial lawyer with more than 30 years' experience. Amor has been a thought leader in e-discovery for almost 20 years and was one of the founding members of The Sedona Conference®. Amor is former chairman of Sedona's Working Group 6 on International Discovery and was the Editor-in-Chief of Sedona's original International Principles.

Robert B. Friedman is a partner at King & Spalding. He is a member of the firm's E-Discovery

Practice Group and regularly counsels multinational entities on discovery matters.

Ignatius A. Grande is an eDiscovery attorney who has practiced at global law firms for more than ten years. Ignatius teaches a course on eDiscovery at St. John's University School of Law and is a member of the Executive Committee of the Commercial & Federal Litigation Section of the New York State Bar Association. He received his B.A. from Yale University and his J.D. from Georgetown University Law Center.

Jennifer Hamilton is senior counsel and global head of Deere's Electronic Discovery Practice Group and the Global Evidence Team. Jenny participates in The Sedona Conference® Working Group 6 on International Discovery. Jenny co-chairs the Corporate Counsel group and is the Editor-in-Chief of The Sedona Conference® Practical In-House Approaches for Cross Border Discovery and Data Protection.

Susan N. Hammond practices in-house, as Senior Counsel in Enterprise Litigation for electronic discovery at United Services Automobile Association (USAA), and signs this brief in her personal capacity. Susan is an active member of The Sedona Conference® Working Group 6 on International Discovery.

Taylor M. Hoffman is an eDiscovery attorney and serves as Chairperson of the Steering Committee of

The Sedona Conference® Working Group 6 on International Discovery and as an editor of both Sedona's International Principles on Discovery, Disclosure and Data Protection in Civil Litigation (Transitional Edition), and International Principles for Addressing Data Protection in Cross Border Government & Internal Investigations.

Jerami D. Kemnitz is an eDiscovery attorney and an active member of The Sedona Conference® Working Group 6 on International Discovery. He is a Contributing Editor of The Sedona Conference® International Principles on Discovery, Disclosure Data Protection in Civil Litigation and a Contributing Editor of The Sedona Conference® Practical In-House Approaches for Cross-Border Discovery & Data Protection.

David J. Kessler is a partner at Norton Rose Fulbright US LLP and chair of the firm's E-Discovery and Information Governance Group. David teaches "E-Discovery" at the University of Pennsylvania School of Law and is an active member of The Sedona Conference® Working Group 6 on International Discovery.

Laura Kibbe is an e-discovery attorney whose practice focuses on coordinating discovery for multinational corporations. She is a member of The Sedona Conference® Working Group 6 on International Discovery and is a frequent speaker on topics relating to cross-border discovery.

Shannon Capone Kirk is E-Discovery Counsel at Ropes & Gray. Shannon is an active member of The Sedona Conference® Working Group 1 on Electronic Document Retention and Production, and co-author of Chapter 10 of The Electronic Discovery Institute's The Federal Judges' Guide to Discovery (3rd ed. 2017).

Anthony S. Lowe serves as associate general counsel at the Federal Home Loan Mortgage Corporation (Freddie Mac) and managing attorney of its litigation operations group. He has also worked developing policy in the areas of law and technology for over two decades both as a presidential appointee with senate confirmation at the U.S. Department of Homeland Security, and as a senior counsel on the U.S. Senate Judiciary. He speaks and writes extensively in the areas of eDiscovery, privacy, information governance and cyber security, participating as faculty on various panels in connection with The Sedona Conference®, ABA, the Electronic Discovery Institute and the Association of Corporate Counsel.

Scott A. Milner is a partner and co-leader of Morgan, Lewis & Bockius LLP's eData practice. Scott counsels and advises companies in electronic discovery and information governance processes and best practices. Scott is a frequent speaker at continuing legal education classes (CLE), seminars, and webcasts and an active member of a number of organizations including The Sedona Conference®.

David S. Moncure is an attorney at Shell Oil Company who advises on international eDiscovery

and data protection issues. David is an active member of The Sedona Conference® Working Group 6 on International Discovery and is the Vice Chair of The Sedona Conference® Working Group 11 on Data Protection and Security.

Patrick Oot is a partner at Shook, Hardy & Bacon, L.L.P. and chair of the firm's Data and Discovery Strategies Group. Patrick previously served as Senior Counsel for Electronic Discovery at the United States Securities and Exchange Commission and Senior Litigation Counsel at Verizon. Outside of work, Patrick volunteers his time as a founder of the non-profit Electronic Discovery Institute.

Robert Owen is Partner in Charge of the New York office of Eversheds Sutherland. He is a nationally recognized expert in e-discovery and an experienced litigator. He is President of the Electronic Discovery Institute and editor-in-chief of EDI's The Federal Judges' Guide to Discovery (3rd ed. 2017).

Farrah Pepper is an award-winning attorney and industry thought leader with deep experience and expertise in electronic discovery. Ms. Pepper has a long history of building and leading teams focused on domestic and cross-border electronic discovery, including founding the electronic discovery practice group at a global law firm and, most recently, creating and leading the discovery team at a large Fortune 100 company operating in some 180 countries. Ms. Pepper received her B.A., summa cum laude, from New York University and her J.D. from the New York University School of Law.

Daniel Regard is the CEO of Intelligent Discovery Solutions. He is an internationally recognized expert on technology and e-discovery. He regularly teaches, writes, speaks, consults and testifies on these topics. He is an active member of The Sedona Conference® Working Group 6 on International Discovery.

John J. Rosenthal is an antitrust and commercial litigation partner in the firm's Washington, D.C. office, who represents clients around the globe in an array of complex antitrust and commercial litigation matters. Mr. Rosenthal is also the chair of the firm's eDiscovery & Information Governance Practice Group. He is a former member of the Steering Committee of Working Group 1 of The Sedona Conference® and a member of The Second Conferences Working Groups 6 (International Discovery) and Discovery 11 (Data Security and Privacy).

Ronni Dawn Solomon is a partner at King & Spalding LLP and leads the e-discovery practice. She is on the Steering Committee of The Sedona Conference® Working Group 1 on Electronic Document Retention and Production and is Co-Editor of Sedona's Primer on Social Media.

David L. Stanton is a litigation partner at Pillsbury Winthrop Shaw Pittman LLP. He leads the firm's Information Law and Electronic Discovery practice group, and he has been working in this field for over 15 years. David serves on the on the

Educational Advisory Board for LegalTech, and he is a member multiple professional organizations including The Sedona Conference® Working Group 1. David oversees Pillsbury's in-house discovery services center, which manages substantial volumes of client data for litigation and investigations, and he regularly represents global organizations engaged in cross-border discovery. David received his B.A. from St. John's College in Santa Fe, New Mexico, and his J.D, from Berkeley Law.

Dee Dee Stephens is an attorney licensed in Texas and California and has been practicing E-Discovery in both law firm and corporate settings for over 10 yrs. She has participated in and lead each phase of the E-Discovery process in both national and international matters. Dee Dee also counsels clients on the implementation and execution of defensible E-Discovery processes.

Miles Stiles has served as in-house counsel for the last 4 and a half years at an international company specializing in drilling services and the construction and installation of pipelines for the oil and gas industry.

Martin T. Tully is a litigation partner with the Chicago office of Akerman LLP and is Co-chair of the firm's Data Law Practice. He serves on the steering committee of The Sedona Conference® Working Group 1 on Electronic Document Retention and Production, The Sedona Conference® Working Group 11 on Data Security and Privacy Liability, and the 7th Circuit E-Discovery Pilot Program Committee.

Paul Weiner is a Shareholder and National eDiscovery Counsel at Littler Mendelson, P.C. He serves as Co-Chair of the Advisory Board for the Georgetown Law Advanced eDiscovery Institute® and on the Steering Committee of The Sedona Conference® Working Group 1 on Electronic Document Retention and Production, and is Editor-in-Chief of Sedona's Commentary on Rule 34 and Rule 45 Possession, Custody, or Control. Mr. Weiner has also served as a court-appointed eDiscovery Special Master in federal and state courts.

Kenneth J. Withers is Deputy Executive Director of The Sedona Conference®. Since 1989, he has taught more than 500 Continuing Legal Education courses in the U.S. and Canada for judges and practitioners on the identification, preservation, collection, review, production, and admission of electronic data in civil litigation and criminal proceedings. From 1999 through 2005, he was a Research Associate and Senior Education Attorney at the Federal Judicial Center, where he was an original member of the Joint DOJ/AOUSC Electronic Technology Working Group (JETWG).

Patrick E. Zeller is the Enterprise Privacy Officer and Senior Corporate Information Governance Counsel at Gilead Sciences, Inc. He has served as an adjunct professor and taught law school courses on E-Discovery and information governance since 2006. Patrick is also a member of The Sedona Conference® and is a Certified Information Privacy Professional (CIPP/US).